Supreme Court, U. S.
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No. 78-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ALLIED INTERNATIONAL PRODUCTS, LTD.,
Petitioner,

v.

TEXTRON INDUSTRIES, INC.,
Respondent.

REPLY MEMORANDUM FOR THE PETITIONER

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I

The respondent cites a long chronology in its brief in opposition (pp. 2-17). But this simply confuses and beclouds the issue here. Most of the matters raised there are not before the Court at this time. There were delays, but the fault was by no means all on one side. Judge Day determined in May, 1975 that "the defendants have contributed significantly to said delayed prosecution." (1st Cir. App. 50.)

The question of fee payments by the petitioner was not an issue before Judge Pettine. The statements in the record about fee payments came from the defendant's counsel, or, improperly and incompletely, from the plaintiff's counsel. They were highly prejudicial, and they obviously affected Judge Pettine, for, in his order of June 13, 1977, he said that

petitioner's first counsel withdrew "apparently because they were never paid." And he referred to "Renewed difficulties regarding fee arrangements." (1st Cir. App. 139; *see also* 1st Cir. App. 145.)

Yet counsel *never* withdrew his appearance.[1] It remained his duty "to represent his client zealously." ABA Code of Professional Responsibility EC-71. That this was not done at the proceedings before Judge Pettine is apparent from a reading of the record relating to the events from October 14, 1976 through the order of March 22, 1977 (1st Cir. App. 52-72), and particularly the transcript of the hearing held on March 7, 1977. (1st Cir. App. 61-68.)

Any defaults were the defaults of counsel, who, using "breakdown of communications" (1st Cir. App. 59) as an euphemism for non-payment of fees, did not comply with the trial court's orders and failed to protect his client's interests. It may be that in many cases it is appropriate to hold the client responsible for his attorney's defaults. But this is a very unusual case, with the client on the other side of the world, and literally helpless to take *any* steps except through its duly admitted American attorney who had entered his appearance and assumed the responsibility to represent his client zealously. This is a default in the American system of delivering legal services, and justice is not well served by visiting the entire burden of the lawyer's default on the foreign client.

[1] 1st Cir. App. 118-130 does contain a motion to withdraw signed by Norton I. Katz, and dated April 6, 1977, more than two weeks *after* Judge Pettine's order of March 22, 1977. But this motion was *never* filed in the district court. It was in fact sent by Mr. Katz to counsel for the defendant, and appears in the record *only* as an exhibit to an affidavit, dated May 9, 1977, and filed by counsel for the *defendant* in the court of appeals.

In fact the services of Mr. Katz were terminated by the plaintiff, as shown by the exhibit attached to the brief in opposition. (Br. in Opp. 2a.)

II

The issue before Judge Pettine on March 7, 1977 arose on the petitioner's failure to comply with the court's pre-trial order of November 11, 1976 (1st Cir. App. 54), the motion to compel answers to interrogatories filed on January 19, 1977 (1st Cir. App. 56), and the motion to dismiss filed on January 25, 1977 (1st Cir. App. 58).

(a) Examination of the record makes it clear that the plaintiff *never* received the pre-trial order of November 11, 1976.[2] There was clearly default on the part of Allied's counsel in not sending this critical order, or in not making it promptly available when it was notified that Allied had not received it.

(b) When the hearing was held before Judge Pettine on March 7, 1977, *Mr. Katz did not appear at all.* Mr. Kennedy, of the Rhode Island bar, did appear at the hearing. He opened his statement by saying (1st Cir. App. 64):

> First off, I'd like to state to the court that I am here today representing Mr. Katz, and whatever interest he has in this matter. *I have not been engaged by Allied International. Like Mr. Katz I*

[2] The respondent says: "Allied's New York counsel says it sent the order to Allied in India and to Allied's collaborator in New York. Allied says it never received it." (Br. in Opp. 11, n. 8.) Neither Judge Pettine nor the court of appeals ever made a finding on this, largely because Judge Pettine was misled by a misstatement of *defendant's* counsel and by the default of the plaintiff's counsel. A reading of the letters appearing in the record makes it apparent that Allied was unaware of the content of the pretrial order and sought assiduously and unsuccessfully to obtain the information from its counsel in New York and in Providence. (1st Cir. App. 157, 158, 117, 164; Petition, p. 11). Whether the difficulty arose because the order was not in fact enclosed with the letter sent by Mr. Katz, or because it was mislaid in New Delhi is not material. The fact is that Allied was not aware of the content of the order, so advised its counsel, but was never sent the information over a period of three months.

> *am not being paid.* Also, I don't intend to represent Allied International, other than for the purpose of this motion to extend the time and work for Mr. Katz for whatever ends he may desire. [Emphasis supplied.]

The respondent's answer to this (Br. in Opp. 22) is: "Whatever Kennedy said, he represented Allied at the hearing and acted for it both before and after the March 7, 1977 hearing." The Court can judge how zealously this representation was conducted in the petitioner's interest. Mr. Kennedy himself injected the fee matter into the proceeding, thus in effect acting as a witness against his client, and the fee matter clearly affected Judge Pettine in his exercise of his discretion.

And this is the crux of the matter. Judge Pettine was exercising discretion. Discretion is a fragile flower, much affected by contamination in the atmosphere,[3] and this was peculiarly the situation in this case. The record here shows clearly that Judge Pettine was in fact affected in the *basic formulation* of his discretion by two matters, one relating to fees, which was irrelevant, and was repeatedly introduced by Allied's counsel, and the other a charge of lying, accepted by the Judge, which was introduced by respondent's counsel. This has been detailed in the Petition (pp. 13-26) and need not be repeated here.[4] It is true that these matters were again considered by Judge Pettine, but by that time the damage had been done.

[3]Compare the observation made long ago by Lord Penzance: "Under cover of the word 'discretion' a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed, and sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices, favorable or otherwise, to the person whose conduct is under review, which the course of the evidence has evoked." *Morgan v. Morgan*, L.R. 1 P.&D. 644, 647 (1869).

[4]In the Petition, reference was made to the fact that counsel for the defendant is "well-known" to Judge Pettine. The brief in opposition says (p. 23): "Just what is Allied insinuating? Nothing less than that Judge Pettine decided the case out of partiality to defendant's counsel!"

Of course, no such insinuation is made. The fact that defendant's counsel is well known to Judge Pettine is relevant, because it was a basis on which Judge Pettine could rightly rely on his statements. Yet the statement about Allied's lying was simply wrong. And it clearly affected Judge Pettine's exercise of his discretion.

The brief in opposition (p. 23) speaks in high terms of Mr. Cavanagh. But Mr. Cavanagh did not enter his appearance until June 8, 1977 (1st Cir. App. 5), long after Judge Pettine had, for practical purposes, so far formulated his views that the die was cast.

On so important a matter as the dismissal of a lawsuit brought by a foreign plaintiff, with serious defaults by its American counsel, and without any real and effective representation of the plaintiff at the crucial hearing on March 11, 1977, the plaintiff was entitled to an exercise of discretion unaffected by irrelevant factors and erroneous statements by defendant's counsel. When that became impossible, it was an abuse of discretion and contrary to the requirements of due process to dismiss the plaintiff's lawsuit without any opportunity for a hearing on the merits.

CONCLUSION

In these circumstances, "The doom entered below seems altogether too final and definitive." *Lyford v. Carter*, 274 F.2d 815, 816 (2d Cir. 1960). The petition should be granted; the judgment should be reversed with directions to remand the case for a prompt trial on the merits.

Respectfully submitted,

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November, 1978